a grantor or devisor is the subject to which reference is now made The general principles of alienation apply here as in other cases, subject to restraints, if any imposed by law.

Reference has, in preceding chapters, been made to particular forms by which the design of a donor or specified purposes may be carried into effect by means of trust provisions. And attention has been called to some distinctions between the effect of conveyances made upon a pecuniary consideration and those where the use or object of the grant is the consideration.

There is nothing peculiar in the acquisition of personal property for church purposes requiring notice here. So far, attention has been called to the acquisition of real property by church organizations.

The inquiry "How may church property be acquired," would perhaps include the acquisition of *pews* by members of a church or others; but this subject, the law relating to pews generally, and cemeteries as connected with churches, will be reserved for subsequent chapters.

WM. LAWRENCE.

BELLEFONTAINE, O., February, 1874.

RECENT AMERICAN DECISIONS.

Supreme Court of Errors of Connecticut.

KEENEY AND WOOD MANUFACTURING COMPANY AND ANOTHER *v.* THE UNION MANUFACTURING COMPANY.

The owners of an upper mill, whose business required the running of their mill only by day, detained the water of the stream during the night, such detention and the larger discharge during the day causing serious damage to the owners of a lower mill, whose business required the running of their mill both night and day. The lower privilege was occupied several years before the upper, and after the upper mill was built the water was for several years allowed to flow during the night, and the lower mill had used it by night and by day. Upon a petition

444; *Pella* v. *Scholte*, 24 Iowa 293; *Trustees* v. *Havens*, 11 Ill. 554; *Waugh* v. *Leech*, 28 Id. 488.

A dangerous doctrine is growing up that the *legislature* may appoint trustees to execute a trust: *Bryant* v. *McCandless*, 7 Ohio, part 2, p. 135. See cases as to power of legislature to control private trusts, chap. 4, Dillon Munic. Corp., § 47 note, and cases cited.

The subject of the *alienation* of dedicated property is discussed in Dillon on Munic. Corp., § 512.

by the lower mill-owners against the upper, for an injunction against the detention of the water by night, it was *held*,

1. That the petitioners had acquired no superior rights by their earlier occupation, or by their use of the water by night, so long as they had exercised no rights greater than such as belong to them as riparian proprietors; the full flow of the stream being nothing beyond such right.

2. That all that the petitioners were entitled to was a reasonable use of the stream against an unreasonable use or detention by the respondents; that the question was whether the respondents had acted unreasonably in detaining the water; and that the burden of proof on this subject was on the petitioners.

The right in such a case of the upper mill-owner to make the stream useful to him by detaining the water during the night, is of the same quality as the right of the lower mill-owner to take the benefit of the constant flow. In deciding between these conflicting rights, there are to be considered: 1. The custom of the country as to the running of mills. 2. The local custom, if there be one. 3. What general rule will best secure the entire stream to useful purposes. 4. Whether the detention of the water is necessarily an injury to the lower mill, and whether the apparent injury is not caused by the insufficiency of its own privilege.

The maxim "*aqua currit et currere debet*" is applicable rather to the matter of the diversion of a stream and to the ordinary rights of riparian proprietors as such, than to the case of mill-owners, who have a right to make a reasonable detention of the water by dams for the purposes of their mills.

PETITION for an injunction, brought to the Superior Court in Hartford county, and reserved, upon facts found by a committee, for the advice of this court. The case is sufficiently stated in the opinion.

Hyde and *Buck*, for the petitioners, cited 2 Kent Com. 439; *Tucker* v. *Jewett*, 11 Conn. 311, 317, 324; *Ingraham* v. *Hutchinson*, 2 Id. 584; *Mason* v. *Hill*, 5 B. & Adol. 1; *Bealey* v. *Shaw*, 6 East 208; *Brown* v. *Best*, 1 Wils. 174; *Saunders* v. *Newman*, 1 B. & Adol. 258, 262; *Tyler* v. *Wilkinson*, 4 Mason 396, 400; *Cary* v. *Daniels*, 8 Met. 466, 478; *Ortman* v. *Dixon*, 13 Cal. 38; *Wheatley* v. *Crisman*, 24 Penn. St. 298, 302; *Gillet* v. *Johnson*, 30 Conn. 183; *Pollitt* v. *Long*, 58 Barb. 20, 34; *Sackrider* v. *Beers*, 10 Johns. 241; *Merritt* v. *Brinkerhoff*, 17 Id. 306; *Wentworth* v. *Poor*, 38 Maine 243; *Davis* v. *Getchell*, 50 Id. 604; *Clark* v. *Rockland Water Power Co.*, 52 Id. 78; *Dilling* v. *Murray*, 6 Ind. 324; *Shears* v. *Wood*, 7 J. B. Moore 345; *Chandler* v. *Howland*, 7 Gray 348; Angell on Watercourses, 3d ed., § 115.

N. Shipman and *Robinson*, for the respondents, cited *Belknap* v. *Trimble*, 3 Paige 577; *Tyler* v. *Wilkinson*, 4 Mason 396; *Tucker* v. *Jewett*, 11 Conn. 311; *Parker* v. *Hotchkiss*, 25 Id.

321; *Gould* v. *Boston Dock Co.*, 13 Gray 442; *Brace* v. *Yale*, 10 Allen 441; *Palmer* v. *Mulligan*, 3 Caines 307; *Thurber* v. *Martin*, 2 Gray 394; *Hartzall* v. *Sill*, 12 Penn. St. 248; *Sampson* v. *Hoddinott*, 1 C. B. N. S. 590; *Mason* v. *Hill*, 5 B. & Adol. 1; *Arkwright* v. *Gell*, 5 M. & W. 202; *Cary* v. *Daniels*, 8 Met. 466; *King* v. *Tiffany*, 9 Conn. 166; *Twiss* v. *Baldwin*, Id. 306; *Wadsworth* v. *Tillotson*, 15 Id. 366; *Barrett* v. *Parsons*, 10 Cush. 367; *Springfield* v. *Harris*, 4 Allen 494; *Haskins* v. *Haskins*, 9 Gray 390; *Pitts* v. *Lancaster Mills*, 13 Met. 156; *Hetrich* v. *Deachler*, 6 Barr 32; *Hoy* v. *Sterret*, 2 Watts 327; *Clinton* v. *Meyers*, 46 New York 511; *Davis* v. *Getchell*, 50 Maine 602; *Jacobs* v. *Allard*, 42 Vt. 303; Angell on Watercourses, § 119.

SEYMOUR, J.—The plaintiffs own paper-mills on the Hockanum river, and find it necessary for the successful prosecution of their business to run their mills during the entire twenty-four hours of the day. The defendant company owns a cotton factory situate on the same river, about a fourth of a mile above the plaintiffs' mills, and the defendants run their factory during the day only, from six o'clock in the morning until six at night, and find it necessary for the successful prosecution of their business to detain the water of the river during the night, and they do thus detain it by means of a dam of such height that at night in times of drought very little water escapes from it.

All the parties depend mainly upon the power of the stream to drive their machinery. Steam-power is, however, used as auxiliary to the water-power by the defendants and also by the mill of the plaintiff Adams.

The plaintiffs preferred their bill in equity to the Superior Court, complaining that the defendants by means of their dam have wrongfully detained the water so as to prevent the plaintiffs from having it as it was accustomed to flow and ought to flow during the night season, and so as in the daytime to be let down in greater quantities than they can advantageously use it in their mills; and praying for an injunction.

The Superior Court referred the case to a committee, who has made an elaborate report, which is accepted; and the question is reserved for our advice what decree shall be passed.

For the full understanding of all parts of the case reference

must be had to the report itself; but it will be easy as we pass along to state enough of it to show on what grounds we proceed in coming to the result we have reached.

The committee concludes its report thus: "The respondents have never by their use and detention of the water since the drought had a purpose of injuring the petitioners. They have not acted maliciously or wantonly, but have acted with sole regard to the most efficient service of their own mills. Their action has been prudent and reasonable, provided, as they claim, they are under no obligation to regard the necessities of the petitioners to run their mills at night, if by so doing they will deprive themselves of what is needful for the efficient running of their own mills by day without resort to steam. If, on the contrary, as the petitioners claim, the latter are entitled to have the water flow at night as it customarily did before the stone dam was built, in order to enable the petitioners to run their mills at night, as before, then the increased detention by the respondents is unreasonable. It occasions, and is likely to occasion, a continuous substantial damage to the petitioners, as compared with the former practice. The respondents have more important business and investments in their concern than either, perhaps both, the petitioners; very much more than have the Keeney & Wood Company. If the respondents are entitled to hold the water at night to use in the day time, as against night work of the petitioners, their mills are adapted to the size and capacity of the stream to run them, and their detention of the water reasonable, for otherwise they must resort to steam as an auxiliary power at an increased expense. The petitioner Adams now has a steam-engine of one hundred and fifty horse power, and both he and the respondents have steam-power adequate to their necessities, whatever be the right as to the detention of the water. It is, as between them, a question as to which shall be at an increase of expense in using steam. The Keeney & Wood mill has no steam-power, nor any need of it with the power allowed to run as before the respondents built their stone dam."

The principal question in the case then is, whether the petitioners are entitled to have the water flow at night as it customarily did before the stone dam was built, in order to enable the plaintiffs to run their mills at night as before.

Paper-mills have been in existence on the plaintiffs' privileges

from about 1816, and running night and day since about 1823. A cotton-mill running only in the day time has been in existence on the defendants' privilege since about 1826. The defendants have frequently rebuilt their dam, and from time to time added to its height, and by shutting their gates at night the flow of the stream was frequently interrupted so as to cause more or less interference with the running of the petitioners at night. In 1867 the defendants built the stone dam complained of, by which the water is detained at night considerably more than it ever before had been.

The plaintiffs, in their brief, claim that they are entitled by such user as is evidence of a grant, to have the water flow at night as it did before the stone dam was built. But it is not claimed that they have ever exercised any rights other or greater than such as belonged to them as riparian proprietors. So long as the defendants had no occasion to detain the water at night, the plaintiffs as riparian owners below were entitled to the uninterrupted flow of the stream by night and by day, and under those circumstances, that being their right, by the exercise of it they could acquire no right to such uninterrupted flow, if afterwards the defendants had occasion to detain more of the water of the stream than they before had done. Nor on the other hand do the defendants lose any of their natural proprietary rights by allowing the water to flow past their mill without interruption, or with only a partial interruption. In order to maintain their proprietary rights they are not obliged to detain more water than they have immediate use for. When the defendants have occasion to detain more water they may do so, keeping within the bounds of reasonable use, and the fact that they have heretofore allowed the water to pass by them without detaining or using it to the full extent of their right, in no manner impairs their present right to its full enjoyment.

These points were so fully considered and firmly settled in the case of *Parker* v. *Hotchkiss*, 25 Conn. 321, that this claim of the plaintiffs, though it appears on their brief, was not insisted on in the argument.

The plaintiffs also founded a claim in favor of the rights they assert, on certain conversations which took place between the parties during the building of the respondents' dam. We think these conversations create no estoppel, and certainly confer no rights.

The rights of the parties seem therefore to resolve themselves into their natural rights as riparian proprietors, and all that the plain-

tiffs are entitled to is a reasonable use of the stream, against an unreasonable use or detention of it by the defendants.

It is settled law that a question of this kind is one of fact, to be decided upon all the circumstances of each particular case, and in order to authorize us to grant the plaintiffs' bill it must appear by the direct finding of the committee, or as matter of legal inference from the facts found, that the detention by the defendants was and is unreasonable. Upon this vital point of the case the committee makes merely a hypothetical finding, which has been already given at length, and which on examination certainly does not expressly find the fact in favor of the plaintiffs. The increased detention of the water by the defendants' stone dam is found to be unreasonable "if the petitioners are entitled to have the water flow at night as it customarily did before that dam was built, in order to enable the petitioners to run their mill at night as before." We have already seen that the plaintiffs are not so entitled by grant, or by such user as furnishes evidence of a grant.

The question then arises, are the plaintiffs so entitled upon any other facts found by the committee. They insist that they are. They say that the committee finds that their mills are adapted to the size and capacity of the stream, and that they have heretofore enjoyed the flow of the stream night and day without any material interruption from the defendants above, and that the defendants do now, more than they have formerly done, detain and interrupt the current. The plaintiffs therefore claim that they have rights by virtue of *prior appropriation* of the surplus water of the stream to a useful purpose. This claim has countenance in the early cases, and so late as 8 Metcalf's Reports 478, Judge SHAW says: "Although the proprietor above might in the first instance have raised his dam higher, keeping within the limits of a reasonable use, yet after such appropriation by the proprietor below he cannot raise his dam and take such surplus, because as to that the lower proprietor has acquired a prior right." A case in 13 California Reports 38, is also cited by the plaintiffs in support of this claim, but on examination of that case it appears to be the law of California that if one first diverts the water of a stream from its natural channel and appropriates it to a useful purpose, he acquires a right to continue the diversion to the prejudice of riparian proprietors below who may afterwards desire to use the stream. That case

rests upon the peculiar law of that state, which in this respect differs wholly from our law.

The doctrine announced by Judge SHAW in 8th Metcalf appears not now to be the law of Massachusetts: *Gould* v. *Boston Duck Company*, 13 Gray 442. The case of *Parker* v. *Hotchkiss*, 25 Conn. R. 321, shows that it is not the law of Connecticut. In *Parker* v. *Hotchkiss* the plaintiff had made precisely the prior appropriation which the plaintiffs have made in this case, and had enjoyed it for more than fifteen years, and made the same claim which is now under consideration. Judge WAITE, giving the opinion of the court, says: "It is difficult to see on what ground this claim can be maintained so long as the plaintiffs in the use of their mill and water privilege did not invade any rights of the defendant."

We are not however prepared to say that such prior appropriation, especially if of long continuance, may not be taken into consideration as one of the many elements which enter into the question of fact, whether in a given case a detention of the water above which interferes with an existing use and appropriation of it below, be or be not reasonable. It is enough for the purpose of the present case to say that it is not a controlling circumstance, and certainly not in point of law decisive.

The plaintiffs claim, in the second place, that their rights as mere riparian proprietors are violated by the acts of the defendants, that it is a familiar maxim that "*aqua currit et currere debet*," and that under this maxim any detention of the water by the proprietor above is unreasonable which inflicts serious damage upon the proprietor below; which the committee find is inflicted in this case by the detention complained of.

Under the maxim referred to water cannot be detained for the use of mills so as to deprive the proprietors below of what is needed for domestic and agricultural purposes, and under that maxim water cannot be *diverted* from its natural channel to the prejudice of the lower proprietors upon the stream.

But water-power is made available mainly by means of dams, by which it is temporarily detained, and its power thereby accumulated and stored up for use, and the maxim of *debet currere* is not applicable to such detentions of the current as are convenient and necessary, and usual for the purpose of making such accumulations.

The right of the proprietor above to make the water useful to him by detaining it long enough to render it useful, is of the same quality as the right of the proprietor below to take the constant course of the current for his use, where both parties are applying the water to the artificial use of propelling machinery. The two rights being thus in apparent conflict, which must yield? In deciding such a question many circumstances come naturally into consideration.

1. In the present case, where the plaintiffs wish to run their mills day and night, and the defendants wish to run theirs during the usual working-hours only, the custom of the country may well be referred to as an important consideration.

On this subject the committee finds that "for many years the respondents have run their cotton-mill only in the daytime, from 6 A. M. to 6 P. M., and this has been and is the general custom of the country with cotton and woollen mills, and mills for the manufacture of most other goods; paper-mills being the leading exception."

Independently of this finding it is matter of notoriety that mills usually lie still at night, and that dams are usually constructed of such height and size as to detain the water during the night for the more efficient working of the mill by day, and that where individual dams are not adequate, large reservoirs are provided like that mentioned in the committee's report at Rockville, the gates of which are closed during the night in order to store up the power which during the day drives the machinery of a long chain of mills which successively receive the supply.

The right of the up-stream proprietors thus to detain and use the water is of the highest importance, and the case must be a strong one in favor of the down-stream owner successfully to resist it.

The cases in Pennsylvania go much further than we are called upon to go in this case in favor of the rights of the up-stream owner. In that of *Hoy* v. *Sterret*, 2 Watts 237, it was decided that if the water was no longer detained than was necessary for the proper enjoyment of it as it passed through the defendant's land for the use of his mill, it was a damage to which the plaintiffs (owning a mill below) must submit. In *Wheelan* v. *Ahl*, 29 Penna. St. 98, the same decision was made, although by means of the detention at night the water did not reach the lower mill till 8 or

9 o'clock in the day, and during the remainder of the day more water was poured into the stream from the upper works than could be used to advantage by the lower mill.

2. In deciding such a question it is important to consider whether the damage of which the down-stream proprietor complains is the necessary consequence of the detention complained of, and whether it may not be imputable to the insufficiency of his own privilege. In this case it is found that "the Keeney & Wood mill has a small and narrow pond only, running up to near the respondents' lower wheels, and when the respondents run full they must always have sent more water than the Keeney & Wood mill used or could hold; but this waste is a good deal increased by the respondents' practice since the drought."

It appears from the committee's report that a paper-mill situate on the Hockanum, above the defendants' cotton-factory, has a reservoir of sufficient capacity to retain the water sent down by day from the Rockvill dam, and thus to run nights and days with great uniformity, and thus that paper-mill does not suffer by the nightly closing of the Rockville reservoir. It is obvious that if the plaintiffs had such a reservoir they would have no grounds of complaint against the defendants, and it would seem that a manufacturer proposing to prosecute a business which requires the use of water night and day, a use admitted to be somewhat exceptional, should secure a water privilege and a pondage adequate to his wants.

3. In deciding such a question it is important to consider also what general rule on the subject will best secure the entire water of a stream to useful purposes. If the plaintiffs are right in their claims, the defendants must either run their mill nights or suffer the useless escape of half the water which flows past their mill. But such water may be saved if the proprietor below is required to see to it that if he wants the water at night he must secure a privilege adequate to such a want. We think, if we should announce it to be the general rule that the water of streams may not be detained and accumulated at night to be applied to machinery during the day, we should render useless a large portion of the water-power in the state.

4. In considering such a question, the local customs of a stream are very proper subjects of inquiry, and it was strenuously urged by the plaintiffs that the Hockanum was mostly appropriated to

paper-mills, and that these mills all run night and day. As already stated, there is one paper-mill above the defendants' mill, but that has a sufficient reservoir of its own for constant use. It appears also that there are several paper-mills below those of the plaintiffs, but it does not appear that any of these mills are injuriously affected by the detention of which the plaintiffs complain, and it does not appear whether they have or have not ample pondage of their own.

There are other matters which we need not refer to, which may properly bear on the question whether the acts of the defendants of which the plaintiffs complain be or be not reasonable. As already stated, the question is ultimately one of fact, and the burden of proof is on the plaintiffs to show that the acts complained of are illegal or unreasonable.

We are satisfied that this is neither expressly found in favor of the plaintiffs, nor is it found by necessary legal implication.

We therefore advise that the plaintiffs' bill be dismissed.

FOSTER, J., dissented.

The question involved in the foregoing case is one of great interest, in most parts of the country, and one not always free from uncertainty and doubt. There can be no question, practically, that where, as in the present case, all the parties to the action have only concurrent rights in the use of the water, in a running stream, for the purposes of propelling mills or machinery, it must be allowed to those above to detain the water a sufficient time to render it useful to themselves. To what extent this detention may be carried, must depend much upon the size of the stream, with reference to the entire use demanded of it by all the mills upon the stream. If the quantity of water is sufficient for all, it must be so used as to give all a constant supply. In such cases it is most unquestionable, that any needless detention of the water by the upper mills, to the detriment of those below, whether done purposely or negligently, constitutes an actionable wrong. All the cases agree in this.

But the perplexity begins only, when the supply of water becomes insufficient for all. In such cases the upper mills cannot be denied the reasonable use of the water, because it causes some detention and some inconvenience to those below. That is indispensable to any beneficial use of the water by the upper mills, and to deny this, would be to give only the free and perfect use of the water to the lower mills. The upper mills are entitled to a reasonable use of the water, in which all have a common interest, and this is to be measured by the necessities of those below, and the extent of the deficiency in supplying all; so that each mill shall be saved its fair proportion of the beneficial use.

Thus there have been cases where it was necessary to detain the water of a small stream, in dry times, for many days, five sometimes, in order that the upper mill should have any reasonable amount of beneficial use, and it has therefore been held legal: *Hetrich* v. *Dechler*, 6 Penna. St. 32. And there

are many other cases involving the same principle: *Hoy* v. *Sterrett*, 2 Watts 327; *Miller* v. *Miller*, 9 Penna. St. 74; *Davis* v. *Getchell*, 50 Me. 602; *Newhall* v. *Ireson*, 8 Cush. 595; *Hayes* v. *Waldron*, 44 N. H. 580; *Merritt* v. *Brickerhoff*, 17 Johns. 306. The right of each mill-owner is to a reasonable use of the water, and that must be measured, as before said, by the amount of the same in proportion to the demands of all. The maxim *Sic utere tuo ut alienum non lædas*, is not to receive a strict and literal construction in all cases. If one were bound absolutely to avoid all injury to others, he might, many times, be compelled to forego all beneficial use of his own property. That will be specially apparent in regard to the use of water, by the upper mill-owners in a stream not supplying water sufficient for all owners upon it. Each mill-owner must have his fair proportion of beneficial use, and must be allowed to detain the water a sufficient time to secure this. No doubt every mill-owner upon a stream, where there is reason to expect a deficiency of water at times, is bound to construct his machinery with reference to such occasional emergencies. But this rule will not apply to extraordinary deficiencies, such as no one could reasonably have anticipated. The rule is thus defined in *Thurber* v. *Martin*, 2 Gray 394, by Chief Justice SHAW: "Every man has a right to the reasonable use and enjoyment of a current of running water, as it flows through or along his own land, for mill purposes, having a due regard to the like reasonable use of the stream by all other proprietors above and below him." And in *Davis* v. *Winslow*, 51 Me. 264, the court say: "If the detention is indispensable to the owner's reasonable enjoyment of his rights in the common highway, and is continued no longer than is necessary for that purpose, the proprietor below is without remedy for any injury he may have suffered thereby." So in *Pitts* v. *Lancaster Mills*, 13 Met. 156, it was held the proprietor of upper mills might detain the water a sufficient time to fill his dam, so that he could operate his mills, and that "any loss which the plaintiffs temporarily sustained by it, was *damnum absque injuria*." In *Wood* v. *Edes*, 2 Allen 578, it was held a riparian owner might detain the water of a running stream by means of a dam for the purpose of a fish-pond, and that the mill-owners below had no cause of complaint, if the water were all returned to the stream before it left his land, although the quantity of water would thus be slightly lessened. The principal case is probably correctly decided upon this point, although possibly admitting of some doubt, whether the water might not have been allowed to pass the upper mill, to some extent, during the night, without unreasonably impairing the defendant's use of it during the day. But we infer, from the opinion, that where mills demand an exceptional use of water, as paper-mills during the night, it is the duty of the owners to so construct their reservoirs, as to detain all that comes during the day, for that purpose, when that may be done without unreasonably impairing the use of the water by proprietors below.

In regard to the question how far superior rights may be acquired by prior occupancy and use of the water in a mill stream, there can be no question, at present, that no such rights can be thus acquired, unless by pre-emption, to which an adverse use of the water is required.

I. F. R.